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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

THE CHILDREN'S PLACE, INC.,	:	Civil Action No.
	:	2:18-cv-11963-ES-JAD
Plaintiff,	:	
	:	
vs.	:	Newark, New Jersey
GREAT AMERICAN INSURANCE	:	Wednesday, October 23, 2019
COMPANY,	:	10:33 a.m.
	:	
Defendant.	:	

TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE JOSEPH A. DICKSON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	Hunton Andrews Kurth, LLP By: JOSHUA S. PASTER, ESQUIRE 200 Park Avenue New York, NY 10166
For the Defendant:	Eckert, Seamans, Cherin & Mellott, LLC By: MICHAEL A. GRAZIANO, ESQUIRE 1717 Pennsylvania Avenue NW 12th Floor Washington, DC 20006
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## Colloquy

3

1 (Conference commenced at 10:33 a.m.)

2 THE COURT: All right. This is The Children's  
3 Place, Inc. versus Great American Insurance Company, Docket  
4 Number 18-11963.

5 May I have appearances, please?

6 MR. PASTER: Good morning, Your Honor. Joshua  
7 Paster from Hunton Andrews Kurth on behalf of The Children's  
8 Place.

9 MR. GRAZIANO: Good morning, Your Honor. Mike  
10 Graziano on behalf of Great American Insurance Company.

11 THE COURT: Okay. I called everybody back in here  
12 because going through this I still wasn't clear about a couple  
13 of things. But since I called you back in here, I continued  
14 to read through it, because I'm trying to -- this shouldn't be  
15 giving me such a hard time. I should be able to figure this  
16 out.

17 So, actually, I think I have only a couple of -- one  
18 or two questions at most at this point. And I'm looking for --  
19 which I had this morning in my file as an attachment.

20 While I'm looking for it, essentially you want the  
21 plaintiff to produce by way of interrogatory and/or document  
22 demand -- I won't remember which one or maybe both -- the six  
23 types of security procedures that they checked off on their  
24 application for the fraudulently inducted transfers for  
25 insurance. Correct?

## Colloquy

4

1 MR. GRAZIANO: Yes, Your Honor. We want -- I  
2 initially did this by document request and I was going to do a  
3 deposition, but I -- as I said at the last hearing, I'm open  
4 to doing this in the most efficient way possible. Essentially  
5 what I want initially is documents or it can be interrogatory  
6 answers that explain whether or not The Children's Place had  
7 these six procedures in place at the time of the application.  
8 And if -- and in addition, whether or not they followed the  
9 procedures in connection with the particular transaction at  
10 issue.

11 THE COURT: Okay. Now, the defense to that is that  
12 these six procedures are found on an application for  
13 fraudulently induced transfers insurance that Judge Salas has  
14 now already ruled they did not need a condition precedent to  
15 get the coverage for this event. Correct?

16 MR. PASTER: That's correct, Your Honor.

17 THE COURT: And since Judge Salas has said there's  
18 no coverage under that application, they're saying that those  
19 procedures -- you're saying -- and I don't want to put too  
20 many words in your mouth. Correct me when I go astray.  
21 You're saying that it's irrelevant.

22 MR. PASTER: That's correct, Your Honor. It's  
23 irrelevant for two reasons. One, as Your Honor pointed out,  
24 this coverage is not at issue in the case. It's already been  
25 dismissed.

1 THE COURT: Right.

2 MR. PASTER: It was a coverage for which Children's  
3 Place paid a separate premium, it's a separately insured risk,  
4 so it's just irrelevant on that. And then separately, as we  
5 discussed at the last conference, security procedures is a  
6 specifically defined term, it applies only to agreements  
7 between the insured, in this case Children's Place, --

8 THE COURT: I remember. I don't mean to cut you  
9 off. That's kind of a different argument, but I get it.

10 MR. PASTER: Correct. It's the --

11 THE COURT: To the extent they're trying to slip  
12 these procedures under that definition, it didn't work.

13 MR. PASTER: That's right, Your Honor.

14 THE COURT: Okay. And I kind of agree with that, by  
15 the way. I don't think it does work. And then there was a  
16 concern you had that they're on a fishing expedition.

17 MR. PASTER: That's also correct, Your Honor. And  
18 it really dovetails from the lack of relevance.

19 THE COURT: On the fishing expedition aspect of it,  
20 I went back and I read again for a third time Judge Salas's  
21 opinion and she did give them the right to amend within 30  
22 days. And we're a little bit beyond that now, but we've been  
23 fighting this fight for a while, so I haven't done any kind  
24 of --

25 MR. PASTER: If I may, Your Honor? We actually did

1 amend, and when we amended obviously we pulled out the  
2 fraudulently induced transfer claim. So there were some --

3 THE COURT: Okay.

4 MR. PASTER: -- additional factual allegations, but  
5 we did amend.

6 THE COURT: Okay. So, but here's where I'm coming  
7 down after all that and making you come back in.

8 Do you want to be heard about something?

9 MR. GRAZIANO: Yes, I would like to respond to his  
10 argument, if I may, Your Honor.

11 THE COURT: Okay.

12 MR. GRAZIANO: Well, there's two reasons we think  
13 it's relevant. And we've been over this, and we'll try to be  
14 as brief as possible.

15 Number one. With respect to the computer fraud and  
16 sharing agreement, which is still in the case, I -- I -- there  
17 has been no determination by Judge Salas as to whether or not  
18 the security procedures exclusion applies. And our position  
19 is it does apply, because interpreting it in the way that  
20 they're interpreting it, to require for every security  
21 procedure that there be an agreement with a customer or a  
22 financial institution would render completely useless and  
23 meaningless the third subpart of the exclusion which says any  
24 procedure that you represented to us you would follow without  
25 any -- because anything that falls into that which also was an

1 agreement with a customer or a financial institution would be  
2 covered by the first subpart of the exclusion anyway, so that  
3 third part would be completely meaningless.

4 So that's -- that's our coverage argument that we're  
5 going to make to Judge Salas, whether we get this --

6 THE COURT: Right.

7 MR. GRAZIANO: -- additional discovery or not. So,  
8 we think -- so the security so the procedures, what they  
9 followed or didn't follow, are relevant to that point.

10 With respect to the second point, the rescission  
11 issue, we haven't technically asserted an affirmative defense  
12 yet, but our position is just that we have -- there's enough  
13 smoke here. There wasn't at the beginning of the case, and as  
14 we've gone along and --

15 THE COURT: Right.

16 MR. GRAZIANO: -- we've learned that there's more  
17 security procedures, there's enough smoke that we believe a  
18 small amount of discovery that's not overly burdensome is --  
19 is warranted.

20 THE COURT: Okay. Just not by way of ruling on any  
21 potential future application, you will have to satisfy the  
22 good faith requirement, as opposed to liberality of pleading  
23 standard, if you want to amend your answer to include an  
24 affirmative defense that you did not assert before. So you'll  
25 have to tell me why you weren't in a position to do it before

1 and what gave rise to the thing now. I actually kind of  
2 anticipated what your arguments will be.

3 Here's where I came down on this. And I've been --  
4 for some -- this is one of those things where a light bulb  
5 goes off. I've been struggling with this. I mean, your  
6 arguments are persuasive and good, but I don't think they  
7 ultimately rule the issue or rule the day. And here's why.  
8 And bear with me.

9 These six -- if you had asked in an interrogatory or  
10 in a document demand to produce any policies that require --  
11 that you follow to investigate new vendors -- in other words,  
12 if you had just named these as topics of discussion or topics  
13 of inquiry in an interrogatory and did not refer to this  
14 application, I don't think we'd be having this fight. Because  
15 within Rule 26 scope of discovery I think they're relevant for  
16 discovery purposes. How it all plays out with respect to  
17 rescission and/or a defense to the -- or to their defense of  
18 exclusion of the security procedure and the policy or anything  
19 else in this case, I can't rule today -- I can't rule on  
20 today. I can't decide today whether they're going to be able  
21 to be used, whether they're going to be precluded at the  
22 trial, or whether they'll have anything to do with the summary  
23 judgment motion. But the point is, I think they're relevant  
24 under Rule 26. So, but you didn't ask those questions.

25 Having discussed this with a colleague of mine, they



1 said, so then you should deny the motion. And I said, well,  
2 here's what's going to happen when I deny the motion. He's  
3 going to go back to his office and immediately draft an  
4 interrogatory asking those questions.

5 So, I don't remember what the interrogatory or  
6 document demand looks like right now, but I'm going to allow  
7 defense to inquire into these procedures, because they look  
8 close enough to the facts of this case that they might be  
9 relevant if there are such procedures, whether or not they're  
10 maintained.

11 I'm not allowing this discovery for purposes of  
12 making an argument that they misrepresented facts on an  
13 insurance application that is no longer in the case. I'm  
14 allowing this discovery with regard to its relevance regarding  
15 whether or not there are security procedures which might have  
16 touched on the events in this case as they are insured with  
17 what's left under the computer fraud policy.

18 MR. GRAZIANO: Understood. Could I ask for a  
19 clarification?

20 THE COURT: Sure. Because I think that was a little  
21 confusing.

22 MR. GRAZIANO: No, it wasn't too confusing, but the  
23 -- with respect to -- I understand you're not allowing the  
24 discovery for purposes of a rescission argument. If --

25 THE COURT: Well, I'm not allowing it --

1 (Extended pause)

2 THE COURT: No, I'm not going to -- I'm not going --  
3 I said that, but I'm not going to restrict it like that.

4 MR. GRAZIANO: Okay. The reason --

5 THE COURT: But what I want to point out is, I'm  
6 allowing it not because I'm trying to give you a path to  
7 rescission, I'm allowing it because I think the information  
8 contained here -- the information you're seeking is relevant  
9 to the facts of this case.

10 MR. GRAZIANO: Understood. I just wanted a  
11 clarification, because if we end up getting into a rescission  
12 scenario, I think I have some arguments in response to what  
13 Mr. Paster said about the application being for separate  
14 coverage, but I -- from -- I take it, from what you just said,  
15 we don't need to go down that road today.

16 THE COURT: No, I -- no, I'm not -- my ruling does  
17 not depend on whether or not you can use it for rescission. I  
18 think it's relevant to the case otherwise.

19 MR. GRAZIANO: Understood. Thank you.

20 THE COURT: And what I was trying to say before is  
21 this rescission argument is going to be litigated at another  
22 day. Probably twice. Once when you try to amend, and then  
23 again, if I let you amend, in front of Judge Salas. And I  
24 understand how you'll make -- I don't understand everything  
25 about how you make your arguments, but I understand the path

1     you're taking.

2             Do you understand what I'm trying to say, sir?

3             MR. PASTER: I do, Your Honor.

4             THE COURT: Okay. So, that's that. I think I'm  
5 finished.

6             MR. GRAZIANO: Okay. Thank you.

7             THE COURT: Everybody understand?

8             MR. GRAZIANO: Yes.

9             THE COURT: You can ask for that discovery, and I --  
10 and I'll leave it to counsel to meet and confer to determine  
11 whether you need to redraft anything. If they require it, I  
12 probably would say you should do it. I mean, he knows what  
13 you want. But let's don't spend a lot of time in depositions  
14 or otherwise asking how this was filled out. I just think the  
15 existence of the policies are what's relevant. Or the  
16 existence or non-existence of the policies and procedures for  
17 security issues is what's relevant for this case. Okay?

18             MR. GRAZIANO: Yes. We'll take it one step at a  
19 time, Your Honor.

20             THE COURT: Okay. Thank you. All right. Thank you  
21 very much.

22             MR. GRAZIANO: Thank you.

23             MR. PASTER: Thank you, Your Honor.

24             (Conference concluded at 10:44 a.m.)

25             \* \* \* \* \*

